89-1291 (1)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1989

ATTA MOSHKELGOSHA, ET AL.

Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND

Respondent

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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# PETITION FOR WRIT OF CERTIORARI

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18pp

## QUESTIONS PRESENTED

Whether State Agency and Courts of the State of Maryland denied petitioners due process of law and equal protection in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States when they failed to apply their zoning ordinance, their Master Plan, and case law in denying petitioners application from open space zoning to commercial.

Whether the State Agency and Courts of the State of Maryland denied petitioners due process of law and equal protection when a State Rule required the State Agency to make a stenographic "record of its proceedings" and provide a copy to the Circuit Court of Prince George's County in an appellate review, and the Agency failed to file petitioners' oral argument made before the State Agency.

Whether the State's interest in acquiring petitioners' property after filing their application and during appellate review in the Courts violated petitioners due process rights.

Whether the manifest interest of petitioners' attorney in acquirng some of petitioners property violated petitioners due process rights.

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## OPINIONS BELOW

The October 10, 1989, Order of the Maryland Court of Appeals denying Petitioners petition for writ of certiorari is located in the Appendix at p. 1. The May 10, 1989, unreported decision of the Maryland Court of Special Appeals is located at p. 3 The May 18, 1988, unreported decision of the Circuit Court of Prince George's County is located at p 25.

The District Council's March 10, 1987, Order of denial is located at p. 34.

## JURISDICTIONAL STATEMENT

Jurisdiction of the Supreme Court rests in 28 U.S.C. §1257(a). On October 10, 1989, the Maryland Court of Appeals denied Petitioners Petition and Supplemental Petition for Writ of Certiorari On May 10, 1989, the Maryland Court of Special Appeals affirmed a decision of the Circuit Court of Prince George's County, affirmed the decision of the district Council, denying Petitioner's application to rezone their property from open space to commercial. On March 10, 1987, the District Council adopted findings of the Zoning Hearing Examiner and denied Petitioners' application for rezoning from open space to commercial.

This petition is filed within ninety days of the Order of the Maryland Court of Appeals denying Petitioners' petition for writ of certiorari.

CONSTITUTION, STATUTES AND RULES INVOLVED

Fifth Amendment of the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United Sates and of the State wherein they reside. No State shall make or enforce any law which shall abridg the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

proprety without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Statute, Rules & Ordinance

Maryland Code Ann. Art. 28, §8-106(f), provides, in pertinent part:

(f) Procedure for appeal. - Within 30 days of service of a petition or within whatever further time the court may allow, the district council shall transmit to the reviewing court the original or a certified copy of the entire record of proceeding under review ...

Maryland Rule B7a provides, in pertinent part:

Promptly after receipt of a copy of the first petition filed in a case pursuant to Section e of Rule B2 (How Appeal Taken) and in any event within thirty days after receipt, unless a different time shall be fixed by order entered pursuant to Section b of this Rule, the agency shall transmit to the clerk of the court the original or certified copy of the record of its proceedings, including any transcript of testimony and any exhibit filed therein ...

Zoning Ordinance, Sec. 27-222

(a) Sectional Map Amendments shall be in conformance with theprinciples of orderly, comprehensive land use planning and staged development, and shall be based on the General Plan or Master plan.

## STATEMENT OF THE CASE

The record below presents several federal constitutional issues in this petition for writ of certiorari: (a) the State of Maryland's denial of petitioners' application for commercial zoning; (b) the State's failure to provide the total "transcript of record" for appeal, required by law; (c) the effect of the State's manifest interest in acquiring petitioners' property; and (d) petitioners' counsel's interest in their property.

Petitioners are the owners of 42.4 acres of land located in the Southeast Quadrant of the intersection of U.S Route 301 and Maryland Route 4, Upper Marlboro, Maryland. The parcel, prior to rezoning, had been commercial since 1951. It was last known as the Marlboro Raceway.

In July 1973, the legislative County Council of Prince Georges' County approved the Master Plan for Subregion VI. Map 1 of the Plan, as enlarged by Map 5 placed Petitioners' land within the grey shaded "Employment Area." Map 2 showed Petitioners entire property within the red existing "Commercial" Area. Map 3 placed Petitioners' parcel in the light green area, outside the permanent low density areas.

In February 1977, another legislative enactment, the Sectional Map Amendment (SMA) for the Upper Marlboro and Lower Patuxent Area, promulgated a comprehensive revision of zoning maps, including inter alia, for Upper Marlboro. The SMA sought to implement the Subregion VI Master Plan of 1973. In doing so, it made several proclamations which affect

Petitioners' property, and which were not employed by the State agencies and Courts of Maryland:

1. It provided that land "identified on the Master Plan as being employment area should be rezoned to appropriate industrial and service commercial zones ..." (SMA App. 12,27); It also proposed "that 55.96 acres of land located at the Intersection of Rt. 301-4 be rezoned, to commercial classification." (SMA, p. 96)

3. It noted that the "Upper Marlboro Employment Area consists of over 677 acres of land ... "and proposed to increase the Employment Area in the vicinity of Route 301.

4. Significantly, the SMA noted that "the Master Plan identifies the four quadrants of the Routes 4 and 301 intersection as being an excellent location for quality industrial development." (SMA, 80).

5. The SMA noted that proposed commercial tracts in the vicinity of Routes 4 and 301 were not only "considered part of the future development area," but they were also part of the 301 corridor where additional "commercial zoning" is good policy.

6. The SMA specified that the "southeast quadrant of the intersection of Routes 4 and 301 includes over 57 acres of land and is recommended to be industrial. (SMA 96)

7. The SMA favored commercial acres [along the highway] in relatively large areas with narrow frontage to limit the number of highway access points." (SMA 96)

8. The SMA not only proposed that "55.96 acres of land located at the intersection of Routes 301 and 4 be rezoned to commercial classifications, to increase but calculated mathematical, that such additional land has the effect

of the inventory of commercial zoning, within, the [301] corridor, from 100.85 acres to 114.42. (SMA 96)

9. Further making a mathematical calculation while showing its intent to increase commercial zoning at the U.S. Route 301 and Maryland Rt. 4 intersection, the SMA observed 19 acres were already commercially developed, and recommended 16% of the proposed zoning that 50.9 acres of existing commercial zoning remain (SMA 96).

10. The SMA drew a chart which requires petitioners' parcel of 42.4 acres in order to reach the total of 677 acres, proposed to be zoned as commercial.

Impact on the Zoning Inventory (Master Plan Employment Area) (SMA p. 83)

| Zone | Existing Area | Proposed Area | Net Change |
|---|---|---|---|
| R-A | -0- acres | 292.9 acres | + 292.9 |
| R-R | 487.8 | -0- | - 487.8 |
| C-2 | 24.46 | -0- | - 24.46 |
| C-S-C | -0- | 8.87 | + 8.87 |
| C-M | -0- | 77.07 | + 77.07 |
| I-1 | 139.43 | 87.08 | - 52.35 |
| I-2 | 25.76 | 41.13 | + 15.37 |
| I-3 | -0- | 170.40 | + 170.40 |
| | 677.45 | 677.45 | -0- |

It is significant that on July 12, 1977, the District Council adopted the SMA proposal with certain amendments that did not alter the provisions alluded to infra. Specifically, the Council affirmed those SMA proposals which pertain to Petitioners' property, as set forth supra. The Council declared, inter alia:

> the District council recognizes that the intersection of MD 4 and U.S. 301 offers an unusual opportunity for Prince George's County to capture a portion of the regional and transient market for retail sales and services, and therefore proposes to enlarge the potential commercial area on the southeast quadrant; and ...

This is the same Southeast quadrant that includes the property of Petitioners.

At the time Petitioners' filed their application on February 11, 1986, the Zoning Ordinance provided, Section 27-222(a);

"Sectional Map Amendment shall be in conformance with the principles of orderly comprehensive Land use planning and staged development and shall be based on the general plan or Master Plan".

The Ordinance is still in force and effect.

In July 1985, Petitioners were recipients of a construction permit from the Department of Natural Resources, Water Resources Administration of the State of Maryland permitting them to effect a construction on part of their property under certain conditions. The Zoning Hearing Examiner was aware that the parties agreed that the Petitioners' property appeared to be zoned commercial on "Existing Situation Map," Map 2 of the

Master Plan. He was also aware that the SMA provided that property in the "Employment Area" will be zoned as industrial and service commercial. Notwithstanding these facts, the Zoning Hearing Examiner zoned Petitioners' property as open space. Another State Agency the District Council adopted the error of the Zoning Hearing Examiner, and in addition asserted the following findings:

"1. The District Council finds that several technical errors were made both in the contents of the text and in the maps accompanying the Subregion VI Master Plan (1973) and the Upper Marlboro and Lower Pautuxent Sectional Map Amendment (1977).

"2. The District Council concludes that despite these technical errors in the adoption process of the Master Plan and the Sectional Map Amendment, that the

Sectional Map Amendment clearly excludes the subject property form the Upper Marlboro Employment Area.

"3. The District Council additionally concludes that the Sectional Map Amendment recommends that the subject property be retained in the permanent low-density, rural living area as identified in the Master Plan."

The Zoning Hearing Examiner concluded that not only were there errors in the SMA but that there were also errors in the Master Plan. Each of the State Agencies and the Courts of Maryland ignored Zoning Ordinance Section 27-222(a) which required the Section Map Amendments inter alia to be based on the Master Plan, rather than "technical errors" of the SMA.

Similarly, the State Agencies and the Courts were aware that the Upper Marlboro Employment Area consisted of 677 acres

and that such a total could be reached only when Petitioners' 42.4 acre parcel was included with some six other parcels.

The record further reflects that the District Council made a finding of mistake based substantially on floodplain for a parcel of real property directly across the highway, 301 at 4, from Petitioners parcel. Petitioners' application sought rezoning upon the grounds of mistake and substantial change in the "neighborhood".

This property was zoned commercial; it was directly within the "neighborhood." North of Petitioners' property is a car dealership which is also within the "neighborhood" of Petitioners property. The record further reflects the District Council failed to deliver to the Circuit Court the total copy of the "transcript of record." The Council omitted

Petitioners' argument upon his application for rezoning, in violation of Rule B7 and Article 28.

It is undisputed that following Petitioners' notice of appeal the District Council failed to deliver to the Circuit Court the "transcript of record" as required by State and Rules of Maryland. The Maryland Court of Special Appeals construed the controlling Rules and Statute and concluded Petitioners were not denied due process of law. Petitioners' appeal to the Circuit Court of Prince George's County, and to the Maryland Court of Special Appeals were without benefit of Petitioners' oral argument, both Courts were aware of findings by the Zoning Hearing Examiner and the District Council that mistakes and technical errors alleged existed in the Master Plan, maps and Sectional Map Amendment provision, among themselves and

between each other. Both Courts rendered their decisions on alleged mistakes and technical errors without consultng Petitioners' oral contentions.

After Petitioners' filing of their petition for rezoning from open space to commercial, the State, on December 26, 1986, advised Petitioners it was interested in purchasing some or all of their property. The State was mindful of the 1973 Master Plan and the 1977 pronouncements of the Sectional Map Amendment. After Petitioners' refused to sell their property to the State, on May 16, 1988, the State filed a Petition For Condemnation, indicating its desire to obtain Petitioners land before it would be zoned commercial, and before its value would be increased.

Neither Court, although requested afforded relief from these unusual circumstances. Neither court found error in the proceedings below.

On August 4, 1987, one of Petitioners' attorneys forwarded a letter to Petitioners, seeking a new fee agreement, asking for 33 1/3 contingency if the Petitioner's property was sold or rezoned as commercial. Counsel for Petitioners had represented them for several months; He knew of Petitioners desire for commercial zoning; he filed pleadings and had become familiar with Petitioners entire record. He no doubt had some opinion about Petitioners' likely-hood of success on their zoning appliation.

Federal Question Raised in The Record

In the exceptions to recommendations of the Zoning Hearing Examiner, p. 16, where Petitio claimed of "unequal treatment." (1986) (R. p. In the Maryland Court of Appeals by the Suppl mental memorandum to petition for Writ of certiorari ignored by the Court (1989)

## ARGUMENTS IN FAVOR OF GRANTING WRIT

According to the Zoning law of the State of Maryland, the 1973 Master Plan of Subregion VI can not admit of mistake or error. Any alleged existing errors or "mistake" must be resolved in favor of the Master Plan, not the 1977 Sectional Map Amendments. Prince George's County Zoning Ordinance Section 27-222(a).

Hence, the State Agency, the Zoning Hearing Examiner acted arbitrarily and capriciously when he denied petitioners' application for commercial zoning, and relegated petitioners' 22 acres to the permanent low density area and open space. As set forth in the Statement of the Case, Maps 2,3, and 5 of the Master Plan patently place petitioners property within the commercial parcel in the southeast quadrant of US 301 and Md.4 intersection.

Moreover, the Zoning Hearing Examiner was aware of property in the same neighborhood at US 301 and Route 4 to which the state had granted commercial zoning, directly across the highway from petitioners' property in 1984. Thus, the Hearing Eaminer denied Petitioners' their rights under the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Circuit Court of Prince George's County, Maryland, the Court of Special Appeals, and the Maryland Court of Appeals all denied Petitioners their constitutional rights when they affirmed the Zoning Hearing Examiner and the County Council. The State Agencies and the Courts of the State of Maryland failed to follow the State's law enunciated in Pattey v. Board of County Commissioners 271 Md. 352 ____ A.2d ____

(1974). In Pattey, where there existed alleged mistakes between a master plan and a zoning map, the trial judge found that a "mistake" had been made.The Court of Appeals corrected the error of the trial court, and noted the status of a master plan thusly, Pattey, Id., 360-361

> Thus, the trial judge fell into error by ignoring the basic distinction between a master plan, on the one hand, and a zoning map, comprehensive zoning, or zoning classification, on the other. . . It is a "mistake" in the latter, not in the master plan, which may support a rezoning.

Hence, the inclusion of petitioners property in the maps of the Master Plan are absolute; they cannot admit of "mistake." In ruling otherwise, the, State Agencies and Courts of Maryland committed gross error; they failed to accord petitioners equality of their laws enunciated in the Master Plan, the Zoning Ordinance, Section 27-222(a) and Pattey

v. Board of County Commissioner, supra, and the United States Constituton as well. It is significant to note the State of Maryland's personal interest in petitioners' property:

1. In 1985, before Petitioners filed their 1986 application for rezoning to commercial, the State sought to purchase Petitioners property.

2. In 1988, while appeal from the state Agency was pending before the Circuit Court of Prince George's County the State filed condemnation proceedings. There can be no question that "just compensation" for petitioners' property is much less if commercial zoning is denied petitioners. The Courts of Maryland denied petitioners Motion for Reconsideration filed after the State filled notice of condemnation proceedings of their property. This two denied petitioners of their due process rights

and just compensation rights guaranteed by the Fifth Amendment to the Constitution.

Maryland Rule B7 provides in pertinent part " ... the agency shall transmit to the Clerk of Court the original or certified copy of the record of its proceedings, including any transcript of testimony and any exhibit filed therein..." Similarly, Article 28 Section (a) and (b) require "a stenographic record" of all hearings and that it be transmitted to the reviewing court in petitions of zoning map amendments. Although petitioners had a hearing for the purpose of a zoning map amendment, the District Council failed to transmit the "original" record of its proceedings to the Circuit court. It omitted Petitioners' oral argument.

The Maryland Court of Special Appeals, interpretation of the aforementioned eliminated petitioners' oral argument from "record of its proceedings," and found the State Agency had committed no error. This interpretation raises substantial constitutional questions under the due process clause of the Fourteenth Amendment and Article 24 of the Declaration of Rights of the Maryland Constitution.

Interpretation of Article 24 of the Declaration of Rights of the Maryland Constitution is derived from the Supreme Court's Fourteenth Amendment decision. Home Utilities Company, Inc. v. Revere Cooper and Brass Co., Inc., 209 Md. 610 (1955), ____ A.2d _____ (1955). Since denial of petitioners' application for rezoning is a de minimis impairment of their property interest, they are entitled to procedural due process

protections Board of Regents v. Roth 408 U.S. 564 (1972). This is so, even though the denial of their due process rights has occurred by judicial interpretation by the Maryland Court of Special Appeals rather than a legislative body. Brinkerhoff-Farris Trust and Savings Company v. Hill, 281 U.S. 673 (1930). The confidential relationship between attorney and client is jeopardized when counsel seeks to take advantage of his client by acquiring an interest in his property.

The statement of the case reflects how the State and Counsel sought to acquire Petitioners' property. Either strain on Petitioners' would seem to jeopardize their due process and equal protection right both together aggravates the matter.

## CONCLUSION

In view of the foregoing, and the record in toto, it is respectfully submitted that Petitioners' Petition for Writ of Certiorari be granted.

Respectfully submitted,

Atta Moshkelgosha

Atta Moshkelgosha
Pro se
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Lanham, Maryland 20706

CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the Petition for Writ of Certiorari was mailed postage prepaid this 12th day of February, 1990 to: Joyce Birkel Hope, Esq., County Administration Building, Upper Marlboro, MD 20772.

Atta Moshkelgosha

Atta Moshkelgosha

# APPENDIX

APPENDIX

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| ATTA MOSHKELGOSHA, et al. | IN THE |
| | COURT OF APPEALS |
| | OF |
| v. | MARYLAND |
| | Petition Docket |
| | No. 240 |
| PRINCE GEORGE'S COUNTY, | September Term, |
| MARYLAND | 1989 |
| | (No. 1185, |
| | September Term, |
| | 1988 |

Filed: October 10, 1988

O R D E R

Upon consideration of the petition for a writ of certiorari and supplement to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and supplement be and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy

Chief Judge

Date: October 10, 1989

UNREPORTED
IN THE COURT OF SPECIAL APPEALS

OF MARYLAND
NO. 1185

September Term, 1988

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ATTA MOSHKELGOSHA, ET AL.

v.

PRINCE GEORGE'S COUNTY, MARYLAND

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Moylan
Bloom
Bell, Robert M.

JJ.

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PER CURIAM

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Filed: May 10, 1989

Atta Moshkelgosha and Mortaza Sholough, appellants, timely filed an appeal from the judgment of the Circuit Court for Prince George's County. That court affirmed the decision of the County Council for Prince George's County, sitting as the "District Council", to deny their application for rezoning. Their appeal presents five questions:

1. Did the District Council, by its own findings and conclusions and by its adoption of the Zoning Examiner's recommendations, err in not granting the requested rezoning?

2. Does the District Council's failure to record and maintain a transcript of the oral argument in an application for rezoning mandate that the council's opposition to appellants' appeal be dismissed?

3. Was limiting all argument to one hour an abuse of discretion?

4. Should the Circuit Court have allowed counsel to use summary exhibits to aid in oral presentation, particularly in light of the unexpected time constraints?

5. In light of the filing of condemnation proceedings against appellants' property almost simultaneously with the Court's decision below, should the court have reconsidered its ruling?

We discern no error and, so, affirm.

1

Appellants are the owners of a 42.4 acre parcel of land, formerly the Marlboro Raceway, located on the east side of U.S. Route 301, southeast of its intersection with Maryland Route 4. At the time of its purchase in 1981, as well as in 1973, when the Sub-Region VI Area Master Plan ("Master Plan") was adopted, and in 1977, when the Upper Marlboro and Lower Patuxent Area was comprehensively rezoned and the Sectional Map Amendment

("SMA") adopted, the entire parcel was within the floodplain of Wester Branch Stream. Having determined that a portion of that parcel could be reclaimed from the floodplain as developable property, appellants filed an application in 1986 for rezoning of 22 acres of the parcel from the O-S (Open Space) zone, into which it had been placed in 1977, to the C-S-C- (Commercial shopping Center) zone.

Appellants' application was premised upon the alternative grounds of mistake and substantial change in the neighborhood. Because the former contention is rather involved, it is necessary that we set it out with greater particularity.

Notwithstanding that the Master Plan identified the subject property in the floodplain of Western Branch Stream and specified that such areas are unsuitable for development, appellants maintains

that the Master Plan also showed the subject property to be in the Upper Marlboro Employment Area.[1/] That there was a mistake was made manifest, in appellants' view,by the fact that the Upper Marlboro Employment Area, as described in the SMA text, consists of 677 acres; however, the listing of the properties comprising it accounts for only 597.75 acres. Appellants maintain that inclusion of their 42 acre parcel plus six others supplies the difference.

Appellants also maintain that their property was mistakenly zoned open space "because the 22 acres that are the subject of the application could be

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[1/] The lower court observed that the parties agreed that the property appeared to be zoned commercial on the Existing Situation Map, map 2 of the Master Plan. That being so and since the SMA provides that property in the employment area will be zoned industrial or service commercial, appellants maintain that when the District Council, in adopting the SMA, zoned the subject property open space, it was a mistake.

reclaimed through filling, filling being a situation that the Council failed to take into consideration." Moreover, they point out that other properties in the floodplain were zoned for "employment area" uses.

Although conceding that there were errors in both the Master Plan and the SMA, the Zoning Hearing Examiner found them to be immaterial to the zoning of appellants' property.[2/] In support of his conclusion, the hearing examiner noted that neither the text of the Master Plan, nor the text of the SMA, placed the subject property within the Upper Marlboro Employment Area. Indeed, the Master Plan, he found, was quite specific in excluding the property from that area. Even more emphatically, he noted that the

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[2/] The errors referred to were inconsistencies between the documents supporting the Master Plan and the SMA as well as between the text of the Master Plan and the SMA and those documents.

SMA specifically recommended that appellants' property be zoned O-S, open space, and the District Council, rather than specifying the property as apart of the Upper Marlboro Employment Area, adopted that recommendation. With regard to the discrepancy between the total acreage planned for the employment area and that listed in the SMA, the hearing examiner arrived at a different explanation than that offered by appellants. He determined that the error lay in the accounting for the total acreage in various zones, i.e., in the I-1 and I-2, and the R-R zones. The District Council agreed and adopted the findings and conclusions of the Zoning Hearing Examiner. In addition, however, it made the following findings:

1. The District Council finds that several technical errors were made both in the contents of the text and in the

maps accompanying the Subregion VI Master Plan (1973) and the Upper Marlboro and Lower Patuxent Sectional Map Amendment (1977).

2. The District Council concludes that despite these technical errors in the adoption process of the Master Plan and the Sectional Map Amendment, that the Sectional Map Amendment clearly excludes the subject property form the Upper Marlboro Employment Area.

3. The District Council additionally concludes that the Sectional Map Amendment recommends that the subject property be retained in the permanent low-density, rural living area as identified in the Master Plan.

Appellants fared no better before the circuit court. That court found that there was substantial evidence in the

record to support the District Council's rejection of each of appellants' arguments.

Notwithstanding appellants' characterization of the issue to be determined as one of law, it is obvious that it is not. At issue here is the correctness of the District Council's denial of appellants' rezoning application. That involves review either of a question of fact or, at best, a mixed question of law and fact, either of which is governed by the "substantial evidence" rule. See Ad + Soil, Inc. v. County Commissioners of Queen Anne's County, 307 Md. 307, 338 (1986); Harford County v. McDonough, 74 Md. App. 119, 122 (1988). That the issue underlying the District Council's decision involves determining the intent, insofar as appellants' property is concerned, of the Master Plan and the SMA, does not mandate

a different result. That question must also be approached from the standpoint of whether the decision was clearly erroneous, that is, whether there is in the record substantial evidence to support it. See Admiral Builders v. South River Landing, 66 Md. App. 124, 128 -29 (1986) (Determination of the meaning of a writing, though a question of law for the court, is subject to the clearly erroneous standard on appeal.) This is especially so when, as here, the meaning of the Master Plan and the SMA has been determined by the District Council, the agency with expertise in the area.

There can be little doubt that there is substantial evidence in the record supporting the District Council's decision. There is evidence, to be sure, suggesting that appellants' property may have been intended to be included in the Upper Marlboro Employment Area. The

existing Situations Map accompanying the Master Plan, is such evidence but there is also some, if not more, evidence that it was not. That is the very essence of the substantial evidence rule. Bear in mind that "it is not the function of the reviewing court to zone or rezone, or to substitute its judgment for that of the zoning authority if the action of the zoning authority is based on substantial evidence and the issue is thus fairly debatable". Northampton v. Pr. George's Co., 273 Md. 93, 101 (1974); Montgomery Co. v. Gr. Colesville Ass'n, 70 Md. App. 374, 382 (1987). As the Court of Appeals observed in Eger v. Stone, 253 Md. 533, 542 (1969):

> . . . if the issue before an administrative body is fairly debatable", that is, that its determination involved testimony from which a reasonable man could come to different conclusions, the courts will not substitute

> their judgment for that of the administrative body, in the absence of an unconstitutional taking of private property for public use without the payment of just compensation ....
>
> This rule will be adhered to even if we were of the opinion that the administrative body came to a conclusion we probably would not have reached on evidence. (Citations omitted)

This is especially the case, where the zoning authority "is presumed to possess the expertise necessary for deciding the matters brought before it". Brouillet v. Eudowood Plaza, 249 Md. 606, 608 (1968).

Considering each of the arguments separately and specifically renders patent that our general conclusion is correct. The mistake alleged by appellants insofar as the SMA is concerned is that the Upper Marlboro Employment Area consists of 677 acres, while the actual inventory of the acreage

set out in the text totals only 597.75 acres. Appellants offer an explanation for the difference. On the other hand, the hearing examiner offered a different, but equally plausible, one. The District Council adopted the hearing examiner's explanation. Moreover, it had previously adopted the recommendation that appellants' property be zoned O-S. The evidence is fairly debatable.

Appellants also rely upon the fact that, although their property is in the floodplain, the acreage sought to be rezoned can now be developed by filling. They contend that this was not known at the time of the adoption of the SMA in 1977. there is evidence to dispute that allegation. As the trial judge observed, there were parcels in the floodplain which were zoned industrial and commercial. Moreover, it was recommended, which recommendation was

adopted by the District Council in 1977, that appellants' property be placed in "the permanent low density, rural living area as identified in the Master Plan [as] open-space zone." Again, the evidence was fairly debatable.

Appellants' final contention is that there was a change in the neighborhood which justified rezoning its property. There is no dispute that there was a rezoning of a property across Route 301 from the subject property from I-3 to C-S-C, commercial shopping center. There is a dispute, however, as to whether that change impacts on appellants' property. The District Council found that it did not and that finding is supported by the facts that the property is located across a major highway and also that it is but

one relatively small parcel. That evidence, in and of itself, is sufficient to render the issue fairly debatable.[3/]

2

Maryland Rule B7a provides:

> Promptly after receipt of a copy of the first petition filed in a case pursuant to Section e of Rule B2 (How Appeal Taken) and in any event within thirty days after receipt, unless a different time shall be fixed by order entered pursuant to Section b of this Rule, the agency shall transmit to the clerk of the court the original or certified copy of the record of its proceedings, including any transcript of testimony and any exhibit filed therein, if the testimony has been recorded

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[3/] Appellants at oral argument conceded that it came close to demonstrating a mistake in the SMA, they having agreed with appellee that it is only a change in the comprehensive rezoning, as opposed to a master plan, which could justify rezoning, see Pattey v. Board of County Commissioners for Worcester County, 271 Md. 352, 360-61 (1974); the necessary implication of that concession is that appellants did not meet their burden of demonstrating a mistake. In any event as we have already pointed out, the issue of mistake was fairly debatable.

> but not transcribed prior to the filing of the appeal, the appellant, unless otherwise provided by law, shall, if required by the agency, pay the expenses of transcription and the expense shall be taxed as costs; provided, that there shall be omitted such papers as the parties to the appeal shall designate by stipulation, and such stipulation shall be transmitted with the record.[4/]

Maintaining that the rule and § 8-106(f) required the District Council to maintain a stenographic record of the oral

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[4/] Maryland Code Ann. Art. 28, §8-106(f), which appellants maintain is also implicated, provides:

> (f) Procedure for appeal. - Within 30 days of service of a petition or within whatever further time the court may allow, the district council shall transmit to the reviewing court the original or a certified copy of the entire record of proceeding under review. By stipulation of all parties to the review proceedings, the record may be shorten. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost. The court may require or permit subsequent corrections to the record when deemed advisable.

argument, which was to be filed with the appellate court within 30 days of an appeal of the District Council's decision, appellants moved to dismiss appellees' opposition to their appeal. The motion to dismiss was filed approximately a year after the record had been filed with the circuit court. Appellants did not specify any basis for the motion to dismiss, that is to say, it alleged no improprieties concerning the proceedings before the District Council, and it has not done so on appeal. Its only contention is that the failure of the District Council to forward a record of the hearing,specifically, the transcript of oral argument, before the District Council disqualified appellees from opposing appellants' appeal in the circuit court.

Assuming that appellants read the rule correctly - as requiring the District Council to maintain a record of the oral arguments before it[5/] - dismissal of appellees' opposition to the appeal would not necessarily, or even probably, result in a victory for appellants; appellants would still have to demonstrate that the District Council's decision was not supported by substantial evidence, which, as we have seen, they could not do. Moreover, the filing of the motion to dismiss long after the record had been filed and without alleging any prejudice occasioned by the failure to include a

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[5/] That reading seems to be overly broad since the rule addresses "any transcript of testimony", not a transcript of any hearing before the District Council. Indeed, the rule appears to address not simply the District council proceeding, but the overall rezoning process, including proceedings in which testimony is taken.

transcript of the oral argument raises a substantial question as to whether appellants waived the objection.

In any event, we do not believe that appellants' reading of Rule B7a is correct. Nothing in the rule, expressly, or by implication, requires that arguments of counsel should, or must, be transcribed. We conclude from the plain language of the rule, therefore, that appellants' reading of it is totally inappropriate.

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Appellants' 1st three arguments all charge that the lower court abused its discretion in making certain rulings. First, they focus upon the court's limiting argument on appellants' appeal to a maximum of one hour. Appellants' had requested two hours of oral argument. They assert that, "[i]n light of the complex nature of the issues in this

case," the court's limitation of argument was an abuse of discretion. Appellants neglect to acknowledge that the court offered to continue the case so as to allow them additional time, an offer appellants refused, or that they, through counsel, acceded to the limitation proposed by the court. In addition, despite the limitation, appellants were permitted to argue for more than one hour.

Continuing to focus upon the limitation of the oral argument, appellants also maintain that it was an abuse of discretion for the court to refuse to allow them to use "summary exhibits" to aid their oral presentation. Apparently perceiving the "summary exhibits" as "new" evidence, not before the hearing examiner or the District Council, the court refused appellants' request that they be used. It was within

the court's discretion to do so. Appellants do not dispute this. More importantly, they do not, either in their brief, or in the joint record extract, identify of what these "summary exhibits" consisted. All we have is appellants' conclusion that the "summary exhibits' were essential to their oral presentation. That is not sufficient basis upon which to fin an abuse of discretion and we decline to do so in this case.

Appellants' final contention is that the trial court abused its discretion by refusing to reconsider its ruling affirming the District council's denial of appellants' rezoning application in light of the filing of condemnation proceedings against appellants' property shortly thereafter. Suffice it to say that the filing of condemnation proceedings provided no sufficient basis

to have permitted the court to have reconsidered its ruling. The court was bound to decide the case base upon the record developed in the agency. The condemnation proceedings did not constitute a part of that record and its pendency was not, therefore, a proper factor to be considered in that regard.

JUDGEMENT AFFIRMED.

COST TO BE PAID BY APPELLANTS.

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

ATTA MOSHKELGOSHA, et al. :

Plaintiffs :

v. : CAL 87-6120

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY MARYLAND, SITTING AS THE DISTRICT COUNCIL :

Defendants :

Filed: May 18, 1988

OPINION AND ORDER

This case comes before this Court on appeal from an Order of the County Council of Prince George's County, sitting as the District Council. The District Council, adopting the findings and conclusions of the Zoning Hearing Examiner, denied Appellants' request for zoning of approximately 22 acres from the O-S (Open Space) Zone to the C-S-C (Commercial Shopping Center) Zone. Appellants argue that the District Council erred in placing the subject property in the O-S Zone at the time of

the 1977 comprehensive rezoning. (Upper Marlboro and Lower Patuxent Area Sectional Map Amendment, 1977). Secondly, they argue that there has been a substantial change in the neighborhood which warrants a change to the C-S-C Zone.

The Appellants bear a heavy burden in seeking to reverse a decision of the District Council. In reviewing the Council's decision this Court may not substitute its judgment for that of the Council. Only when there is no room for reasonable debate or where the record is devoid of substantial supporting facts may this Court reverse a decision of the District council or declare its action arbitrary, capricious, or illegal Prince Georges' Co. v. Meininger, 264 Md. 148, 152, 285 A.2d 649 (1972); Zengerle v. Bd. of Co. Comm'rs, 262 Md. 1, 17, 276 A.2d

646 (1971). As the Court of Appeals stated in Brouillet v. Eudowood Plaza, 249 Md. 606, 608, 241 A.2d 404, 405 (1968):

> . . . The zoning authority is presumed to possess the experience necessary for deciding the matters brought before it and if its decision is based on substantial evidence then the courts may not substitute their judgment for that of the zoning authority.

Keeping this standard of review in mind this Court will not review the facts of this case.

Appellants' first argument is the District Council erred in placing the subject property in the O-S Zone, and that the Master Plan indicated that the subject property was commercial property. In fact both the Appellant and Appellee

agree that the subject property appears to be zoned commercial on Map 2 (existing Situation Map) of the Adopted & Approved Master Plan for Subregion VI (July, 1973). The Appellee contends that that designation on the Map was an error and that other Maps contain additional errors. Map 4 (Physical Characteristics) of the Master Plan, for example, shows the subject property to be outside the floodplain, while both parties agree that the property, as is, lies within the floodplain. Additionally the text of the Adopted and Approved Master Plan for Subregion VI (Page 11) clearly places the subject property outside of the Upper Marlboro Employment area -- a fact that the Appellants disagree with but do not rebut.

The Appellants next challenge the accuracy of the Upper Marlboro and Lower Patuxent Area Sectional Map Amendment ("SMA") (1971). The SMA text (Pages 80 and 83) states that there is a total of 677 acres in the Upper Marlboro Employment Area, an area within which Appellants contend their property is situated. However, the inventory of acreage within the Upper Marlboro Employment Area contained in the Impact on Zoning Inventory Table (SMA Text pp. 39-40) totals only 597.75 acres. Appellants contend that their property was mistakenly omitted from this inventory, and that if the acreage of their property, along with several other parcels not owned by them, are added to the 597.75 acres listed in the Zoning Inventory Table, the figure of 677 acres mentioned on pages 80 and 83 of the SMA

text is reached. Appellee contends that the 677 acre figure was a mistake and that the correct acreage for the Upper Marlboro Employment Area is 597.75.

The Court notes that the physical description of the Upper Marlboro Employment Area clearly excludes the subject property (SMA Text, Page 80), as does the map on page 83 of the SMA. Also the SMA text specifically recommended O-S Zoning for the subject parcels. (SMA Text, page 110).

Based on these facts, this Court concludes that the District council's finding that the subject property was not intended for commercial zoning, was based on substantial evidence.

The Court similarly finds that the District Council's finding that there were no conditions of change justifying a

rezoning of the subject parcel, was based on substantial evidence. Appellants' "change" argument has 2 prongs. First, they argue that the property can now be filled, and thus taken out of the floodplain, a fact not known at the adoption of the SMA in 1977. (T.33) However, the fact that the property was in the floodplain was not the sole reason for the O-S Zoning. Indeed, a number of parcels in the floodplain of the Upper Marlboro Employment Area were zoned industrial and commercial. (Exh. 37) The apparent reason for the O-S Zoning was that the subject property was located in a rural living area proposed for low-density development. "The SMA recommends that the permanent low-density, rural living area as identified in the Master Plan be rezoned to the Open-Space Zone. (SMA text, 56).

The second prong of the "change" argument concerns a small parcel of land across Rte. 301 from the subject property which was changed from I-3 Zone to a C-S-C Zone in 1984. the basis for that change rested on completely different grounds than those at issue here (Ex. 35). The zoning change for the parcel across Rte. 301 to a C-S-C Zone does not impact on the character of the subject property as it is located across a major highway.

For the reasons stated above, it is this 18th day of May, 1988, by the Circuit Court, sitting as the District Council of Prince George's County, sitting as the District council in reference to Zoning Map Amendment Application A-9596 is hereby AFFIRMED.

S/

ROBERT J. WOODS, JUDGE

Copies sent by the court to:

County Council of Prince George's
(District Council)
Jess Joseph Smith, Jr., Esq.
Joyce Hope, County Attorney
By: /S

Case No.: A-9 6
Applicants: Atta Moskelgosha
and Mortaza Sholough

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL

ORDER OF DENIAL

Filed: March 10, 1987

IT IS HEREBY ORDERED that Appellant No. A-9596, requesting rezoning from the O-S Zone to the C-S-C Zone, for property described as approximately 22 acres, and also described as 6000 S.E. Crain Highway, located on the Southeast side of Crain Highway approximately 2,100 feet southwest of Maryland Route 4, be and the same hereby is

DENIED, for the reasons states in the attached findings and conclusions of the Zoning Hearing Examiner, which are hereby adopted as the basis for denial, in addition to the following findings:

1. The District Council finds that several technical errors were made both in the contents of the text and in the maps accompanying the SubregionVI Master Plan (1973) and the Upper Marlboro an Lower Patuxent Sectional Map Amendment (1977).

2. The District council concludes that despite these technical errors in the adoption process of the Master Plan and the Sectional Map Amendment, that the Section Map Amendment clearly excludes the subject property from the Upper Marlboro Employment Area.

3. The District Council additionally concludes that the Sectional Map Amendment recommends that the subject property be retained in the permanent low-density, rural living area as indentified inthe Master Plan.

Adopted this 10th day of March, 1987, by the following vote.

In Favor: Council Member Pembeton, Bell, Castaldi, Casula, Cicoria, herl, Mills and Wineland

Opposed:

Abstained:

Absent: Council Member Wilson

Vote: 8-0

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-WASHINGTON REGIONAL DISTRICT IN PRINCE GEORGE'S COUNTY, MARYLAND

By: _____
Hilda R. Pemberton, Chairperson

ATTEST:

_____
Jean M. Schmuhl, Clerk